IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

LESTER LEROY BOWER, JR.,	§	
VS.	§	CIVIL ACTION NO. 1:92cv182
DIRECTOR, TDCJ-ID	§	

MEMORANDUM OPINION

Petitioner, Lester Leroy Bower Jr. proceeding through his appointed counsel, Peter Buscemi, Grace Speights, and Anthony Roth filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On June 12-16, 2000, this court conducted an evidentiary hearing on petitioner's claims regarding the effectiveness of his counsel at the guilt/innocence and punishment phases of his trial.[1] The parties were allowed until September 1, 2000, to submit post-hearing briefs.

Petitioner was convicted in the 15th Judicial District Court of Grayson County, Texas, of four capital murders and sentenced to death by lethal injection on each conviction. The Texas Court of Criminal Appeals affirmed the conviction on direct appeal. *Bower v. State,* 769 S.W.2d 887, (Tex. Crim. App.), *cert. denied,* 492 U.S. 927, 109 S.Ct. 3266 (1989). Petitioner's state application for writ of habeas corpus was denied by the Texas Court of Criminal Appeals. *Ex parte Bower,* 823 S.W.2d 284 (Tex. Crim. App. 1991).

[1] An evidentiary hearing was necessary because the state habeas hearing consisted of a paper hearing, and the state habeas judge was not the same as the trial judge. *See Perillo v. Johnson,* 79 F.3d 441 (5th Cir. 1996).

Petitioner now brings his first petition for a federal writ of habeas corpus. Petitioner has asserted fourteen grounds for review in the federal petition. This action was filed prior to April 24, 1996, and thus is reviewed pursuant to the pre-AEDPA standards. The evidence and testimony presented at trial have been summarized by the Texas Court of Criminal Appeals in its opinion on direct appeal. The summary is quoted in its entirety below to provide a factual background for the conviction.

> Testimony at trial showed that one of the victims, Bobby Glen Tate, owned the B & B Ranch which was located near Sherman. Mr. Tate owned an ultra light aircraft which he stored in a hangar located on his property. Another ultra light aircraft owned by David Brady was also stored in the hangar. Evidence was presented to show that Tate had decided to put his ultra light up for sale and his friend, Philip Good, another one of the victims, who sold ultra lights was attempting to find a buyer for the aircraft. A day or two before the commission of the offense, Tate told his wife, Bobbi, that Philip Good had met someone the previous Wednesday who was interested in buying the ultra light.
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> On October 8, 1983, Mr. Tate went out to his ranch to work on a house he was building. According to Bobbi Tate, he was to return to their home in town around 4:30 p.m. About 7:30 p.m., when he failed to return, Bobbi and her stepson, Bobby Jr., went to the ranch. Outside of the hangar, they saw vehicles belonging to Tate, Philip Good and Ronald Mays. However, the hangar was locked and no lights were showing through the windows. Bobbi retrieved a key from her husband's pickup and unlocked the hangar door. Upon opening the door, they saw the body of Ronald Mays lying in a pool of blood. Bobbi and Bobby, Jr. went to the nearest phone and called police.
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> Marlene Good, the widow of Philip Good, reiterated a similar story. She testified that on September 30, 1983, someone called their home and spoke with Philip for ten or fifteen minutes regarding an advertisement Philip had placed in "Glider Rider" magazine regarding the sale of an ultra light. Philip told the caller that he had sold the ultra light advertised in the magazine, but he had another that he could sell. On the following Monday or Tuesday, the man called again. On Wednesday, October 5, Philip met the man at the Holiday Inn in Sherman and took him out to the B & B Ranch in order to show him Bob

Tate's ultra light. When Philip returned at about 4:00 p.m., he told Marlene that he thought he had sold Bob Tate's ultra light and the man was going to pick up the plane on Saturday, October 8. On October 8, Marlene testified that she spent the day with Ronald Mays' wife. Philip spent the day helping Jerry Brown build an ultra light in Philip's hangar. At 3:30 p.m., Philip called her and told her he was going to meet the man at the hangar on the B & B Ranch at 4:00 p.m. At approximately 4:30 p.m., Ronald Mayes left to go the hangar at the ranch. When he had not returned by 6:30 p.m., Marlene went to the hangar to see what was happening. When she arrived, she too saw all the vehicles parked outside. The door to the hangar was locked and when she looked into the hangar windows, she could see that Bob Tate's ultra light was missing. Seeing that no one was around, she went home.

When investigators arrived on the scene, they discovered a grisly sight. Immediately inside the door of the hangar, they found the body of Ronald Mays. Underneath a pile of carpeting, investigators found the bodies of Philip Good, Bobby Tate, and Jerry Mack Brown. Good, Tate, and Brown had each been shot twice in the head. Mays had been shot once in the head, once in the neck, once in the right arm and once in the right side of the chest, and once in the back of the chest. All of the victims still had their wallets and their jewelry. Tate's ultra light which had been in the hangar earlier in the day was missing. A table situated against one wall of the hangar had a large spot of blood on it. Tests showed that this blood matched a sample of blood taken from Tate's body during an autopsy. This, plus the placement of the bodies underneath the carpet, led investigators to speculate that Tate had been shot while sitting at the table and then had been dragged over and placed with the bodies of Brown and Good. Investigators also found eleven spent .22 caliber shell casings which had been manufactured by Julio Fiocchi. The scattered arrangement of the casings on the floor of the hangar indicated that the killer had used an automatic weapon rather than a revolver, since an automatic ejects the cartridges after each shot.

Dr. Charles Petty performed autopsies on the victims. According to Dr. Petty, three of the victims, Good, Brown and Tate all sustained two gunshot wounds to the head. In the cases of Good and Tate, both men had one contact wound. On the other hand, both of Brown's wounds were contact wounds. Mays sustained one contact wound to the head and four other wounds to the upper part of his body. Dr. Petty further testified that the presence of the contact wounds indicated that when the weapon was fired, the muzzle of the gun was placed directly against the victim's head. In addition, the gunpowder residue

left on the victims indicated that in each instance the murder weapon was equipped with a silencer. Dr. Petty testified that he removed eleven bullets and fragments from the victims. All of the bullets appeared to be .22 caliber hollow point bullets.

Larry Fletcher, a firearms examiner with the Dallas County Institute of Forensic Sciences, testified that tests run on both the spent casings and the bullets indicated that the shots were fired from either an AR-7 .22 caliber rifle, a Ruger .22 caliber semi-automatic pistol, or a High Standard .22 caliber semi-automatic pistol. Markings on the bullets indicated that a silencer was used. In addition the ammunition was manufactured by Julio Fiocchi and was A-sonic (traveled at speeds below the speed of sound) and had hollow points. Fletcher testified that A-sonic ammunition had the characteristic of reducing the noise discharge normally heard upon the firing of a weapon. Fletcher also testified that Julio Fiocchi ammunition was unique in that in his nine years as a firearms examiner, he had never encountered it before. Due to the condition of the bullets, Fletcher could positively say that only two of the bullets were fired from the same weapon. One of these bullets was extracted from the body of Mr. Mays and one from the body of Mr. Tate.

Much of Fletcher's testimony was duplicated by the testimony of Paul Schrecker, a firearms examiner with the FBI. Schrecker testified that all eleven casings were fired from a single weapon, and the markings on the casings were all consistent with a Ruger firearm. His examination of the bullets indicated that at least seven of the bullets were fired by the same weapon. He agreed with Fletcher that a silencer was used. As far as the type of ammunition used, Schrecker testified that he had never encountered Fiocchi .22 caliber long rifle ammunition before this case.

Dennis Payne, appellant's supervisor at Thompson-Hayward Chemical Company in Dallas, testified that appellant had worked for the company in Colorado until he was laid off in February of 1983. Then in May of 1983, Payne had hired him for a sales position in Dallas. Although appellant's job performance in Colorado had been excellent, his performance in Dallas was poor.

While working in Dallas, appellant had been assigned a telephone credit card. A review of the record of the Thompson-Hayward Chemical phone bills indicated that on Friday, September 30, a call was made and charged to appellant's company credit card. This call was made to Phillip Good's residence and the conversation lasted ten minutes. A direct dial call was made to Philip Good's residence again on Monday, October 3. This was a two minute call. Another call was placed on appellant's

credit card to Philip Good's residence on Friday, October 7. This call lasted three minutes.

Another one of appellant's coworkers, Randal Cordial, testified that prior to the company sales meeting on January 3, 1984, appellant told him that he was building an ultra light airplane and lacked only the engine.

FBI Special Agent Nile Duke testified that after they traced the above-mentioned phone calls to the Thompson-Hayward Chemical Company, he began interviewing all the employees of the company in hopes of finding out who had placed the calls. After learning that appellant had told Special Agent Jim Knight that he had telephoned Philip Good, he scheduled an interview with appellant on January 11, 1984 at the company office. During the two hour interview, appellant told Duke that he had seen an advertisement in Glider Rider Magazine regarding an ultra light aircraft that Good had for sale. Appellant admitted calling the Good residence twice. According to appellant, during the first call which he said was the shortest, he had spoken only with Mrs. Good who told him that Mr. Good was not at home. He later called back and spoke with Mr. Good who informed him that the ultra light had been sold. Appellant told Duke that he had made only two calls and none of the calls had been placed on company credit cards. Appellant also told Duke that he had never made an appointment to see Good and had only passed through Sherman on his way to Tulsa or Gainesville. When asked his whereabouts on the day of the murders, appellant told Duke that he could not account for his whereabouts on October 8, although he did remember that he was sick with a virus on Monday, October 10 and had stayed home from work. Finally Duke testified that appellant admitted he owned a .300 Winchester Magnum rifle, a Remington 1100 shotgun, a Savage Model B side-by-side double barrel shotgun, a Ruger 277V .220 caliber rifle, a 6.5 caliber Japanese rifle, a Winchester bolt action .22 caliber rifle, a Marlin lever action .4570 caliber government rifle, a .243 caliber Remington 700 rifle, and a .20--Model 929 Smith and Wesson .44 caliber Magnum revolver. Appellant also told Duke that he had previously owned a .357 caliber revolver. When asked specifically about a .22 caliber handgun, appellant replied that he did not own one.

On January 13, 1984, appellant went to the FBI office in Dallas to take a lie detector test. After talking with the agents there, appellant decided not to take the test. According to FBI agent William Teigen, at that point all the authorities knew about appellant was that he was employed at Thompson-Hayward, that three telephone calls had been made on the company phone bill to Philip Good's residence and that he was interested in

ultra lights. Appellant stayed and talked with the FBI agents some four hours. During this conversation, appellant admitted that he had made the calls but that he decided not to buy the ultra light from Good and never had any further contact with him. Appellant also told the agents of his interest in ultra lights. Appellant related to the agents how he had spent hours researching ultra lights and how he hoped someday to build an ultra light. Appellant went on to tell the agents that he had already obtained a piece of fabric for the covering, a fiberglass boat seat and some aircraft aluminum. Teigen testified at trial that after talking with appellant he believed that appellant was more than obsessed with the aircraft. When asked specific questions by the agents, appellant said that he had never bought an ultra light, that he had not been in Sherman on the day of the murders, that he had not met Philip Good on the day of the murders and had never met him in person, that he did not know where the missing ultra light was, and that he had never seen the missing ultra light.

After further investigation, a search warrant was obtained for appellant's residence. The search was conducted during the evening of January 20, 1984. Among the items seized were various manuals and magazines which were introduced into evidence at trial: a manual on the Cuyuna ultra light aircraft engine, a magazine entitled Glider Rider's Magazine which showed appellant as a subscriber, the World Guide to Gun Parts, the Instruction Manual for Ruger Standard Model .22 Automatic Pistols, Vol. II of Firearm Silencer Manual, two Xeroxed pages from Shotgun News depicting silencers and silencer weapons, The AR-7 Exotic Weapons System Book, a manual on explosives entitled High-Low Boom! Modern Explosives, another manual entitled Semi-Full Auto, AR-15 Modification Manual, another weapons manual entitled Rhodesian Leaders Guide, and several catalogs containing ads for military equipment including guns, clothing and numerous publications including books on how to kill. Authorities also found a form letter address to "Dear Customer" from Catawba Enterprises, indicating that appellant had purchased an item from the company. Authorities also found inside a briefcase which was located inside appellant's garage an Allen wrench which could be used to mount a Catawba silencer to a pistol and a packet of materials which included among other things appellant's Federal Firearms Licenses which permitted him to sell firearms, ammunition and other destructive devices. Appellant's own Firearms-Acquisition and Disposition Record which was also seized during the search indicated that he bought a Ruger RST-6-automatic .22 pistol, serial number 17-28022 on February 12, 1982 and sold it to himself on March 2, 1982. Investigation

showed that on February 12, 1982, appellant also ordered three boxes of Julio Fiocchi .22 ammunition. Perhaps most incriminating were the parts of the ultra light found during the search. In the garage were two ultra light tires and rims with the name "Tate" scratched in each rim. Another ultra light tire and rim were found in appellant's house. Six pieces of aluminum ultra light tubing were found in the garage. Wadded up on top of a box in the garage were warning stickers that had been removed from the aluminum tubing of an ultra light. In addition, an ultra light harness was found in the house and a fiberglass boat seat was found in the garage. Authorities also removed a pair of rubber boots and a blue nylon bag from appellant's garage after noticing what appeared to be blood stains on these items. Also removed was a sledge hammer and some ashlike debris taken from the trunk of appellant's car.

Scientific evidence presented at trial showed that a fingerprint belonging to one of the victims, Jerry Mack Brown, was found on one of the pieces of ultra light tubing found in appellant's garage. In addition, an analysis of the sledge hammer removed from appellant's garage showed that material present on one side of its head was polypropylene, the same material which was used to make the American Aerolight decals. Metallic smears present on the other side of its head tested out to be of the same type of aluminum alloy as was used to make the Cuyuna engine, the reduction unit for a Cuyuna engine, the crank case and the carburetor used in the ultra light aircraft. An analysis of the material taken from the trunk of appellant's car also revealed a fragment of this same aluminum alloy. A forensic metallurgist with the FBI determined that this metal fragment was once a portion of a reduction unit for an ultra light engine and it appeared that the reduction unit was fragmented by a smashing action, consistent with a blow from a sledge hammer. Also found in the debris from the trunk of appellant's car were fragments of an American Aerolights decal. Tests on the boots removed from the garage showed the presence of human blood on the right boot but an attempt to type the blood was inconclusive. Tests on the blue nylon bag found in appellant's garage also indicated the presence of human blood.

Other testimony was presented to show that Catawba Enterprises dealt primarily in silencer parts and that the Catawba silencer could be easily installed on a Ruger RST-6 semi-automatic .22 pistol with an Allen wrench. Ed Waters, the attorney for Catawba Enterprises testified that ninety-nine per cent of the company's business was selling silencers and thus if appellant had one of the company's form letters acknowledging a transaction,

appellant had probably purchased a silencer from the company.

Sandy Brygider, the owner of Bingham Limited, the sole distributor of Julio Fiocchi ammunition in the United States testified that the .22 sub-sonic Fiocchi ammunition was not sold over the counter but rather was a specialty item used primarily for suppressed weapons. Brygider testified that in the previous three years, his company had sold Fiocchi ammunition to only ten or fifteen dealers in Texas. He further testified that his company records showed that they had shipped three boxes of Fiocchi .22 long rifle sub-sonic hollow point ammunition to appellant on February 12, 1982 and five more boxes on December 10, 1982.

Lori Grennan, the customer service coordinator for American Aerolights, testified that her company manufactured the ultra light owned by Bob Tate. She testified that it was possible for the aircraft to be broken down and put into a thirteen foot carrying case and carried by one person. Grennan also testified that every ultra light manufactured by her company bears three company decals, two on one of the pieces of tubing and one on the engine. However, after examining the tubing removed from appellant's garage, she noted that these stickers decals were not present. She also testified that every ultra light has certain warning stickers. When shown the wadded up stickers found on the box in appellant's garage, Grennan testified that those were the warning stickers that would go on the ultra light manufactured by her company. Finally, Grennan testified that the harness and tire rims found in appellant's garage came from an ultra light manufactured by American Aerolights.

Marjorie Carr, the owner of a fruit stand in Sherman, testified that she had seen appellant in the company of Philip Good in Sherman in late September of 1983. According to Carr, Good and appellant had come into her stand and appellant was interested in buying some oranges. Carr related that she spoke with appellant for some ten or fifteen minutes and she remembered appellant telling her that he had moved from Colorado several months earlier and was then living in Dallas.

Further testimony showed that appellant had gone to the Arlington Sportsman's Club on September 30, 1983 and had spent fifteen minutes firing .22 ammunition.

During the defense case-in-chief, appellant presented several witnesses who testified that appellant's reputation for being a peaceful and law-abiding citizen was good. Evidence was also presented to show that although appellant had bought a Ruger RST-6 semiautomatic .22 pistol in 1982, he had lost it in the mountains of Colorado while backpacking alone in August

> of 1982. Finally, appellant's wife testified that on the morning of the offense, appellant left their home around 6:30 a.m. to go bow hunting. He returned home around 6:30 p.m. *Bower v. State,* 769 S.W.2d 889-893.

Petitioner cannot receive relief on a claim which seeks the imposition of a new rule of constitutional law. New rules of constitutional criminal law generally may not be announced or applied on habeas corpus unless they come within one of two exceptions. A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final and application of the rule was susceptible to debate among reasonable minds. The exceptions are: 1) that the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe; and 2) that the new rule requires the observance of fairness safeguards that are implicit in the concept of ordered liberty. *See Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060 (1989).

Actual Innocence

In the first two grounds for review, petitioner submits that he is innocent of the murders for which he was convicted.[2] In his first ground, petitioner asserts that the execution of an innocent man would violate the Eighth Amendment prohibition against cruel

[2] These claims were submitted prior to the Supreme Court's decision in *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853 (1993).

and unusual punishment. In his second ground, petitioner asserts that the execution of an innocent man would violate the due process clause of the Fifth and Fourteenth Amendments.

In support of the actual innocence claim, petitioner submits four affidavits. These affidavits were filed in the trial court. The trial court made specific findings of fact and conclusions of law concerning the "new evidence" submitted. The trial court found the evidence to "bear no indicia of reliability" and to be information that is a matter of public record. *Ex parte Bower,* 21,005-01 at 480.

The affidavits were submitted to this court under seal by the state courts. The petitioner requested the affidavits be placed under seal in this court for the protection of the affiants. The respondent opposed the sealing of the documents on the basis that an investigation was necessary to determine the reliability of the affidavits. This court allowed the affidavits to be placed under seal with the provision that the respondent could investigate their reliability, and either party could submit additional information for the record pursuant to Rule 7, Rules--§ 2254 Cases. Neither the respondent nor the petitioner had submitted additional material to be considered on this matter prior to the evidentiary hearing.

The affidavits are of three individuals. The first individual is a female who submitted an affidavit on December 7, 1989, six years after the murders. The affiant believes her former boyfriend and his three friends are responsible for the Sherman murders. The affiant decided to come forward after reading a 1989 newspaper

article about the murders. According to the affiant, her boyfriend admitted he and his friends had killed four people in Sherman. The boyfriend is alleged to have made several subsequent references to the murders. The affiant stated that her boyfriend said the Sherman murders were linked to a drug transaction that had gone bad. In February 1984, the affiant broke up with her boyfriend.

The second affidavit, submitted on January 10, 1992 is of a female who said she was driving by the scene of the murders at exactly 5:38 p.m. on October 8, 1983. The affiant stated she got out of her car to adjust her child in his car seat and saw six or seven men at a building "some distance" from her location. The affiant noticed a tall man with a beard and mustache who "may have been wearing a hat" look toward her. She also saw a dark-colored Bronco or Blazer. The next day the affiant read about the murders in the Sherman newspaper. The affiant did not come forward with this information, except to tell her husband who is now deceased, until after petitioner's trial. On May 10, 1984, she told FBI Agent James Blanton that she had seen only three men present at the scene of the murders. On May 30, 1990, the affiant met with petitioner's investigator. The investigator showed the affiant a photo of one of the four alleged killers suggested by the first affiant. The second affiant stated that the man in the photo bore a striking resemblance to the person she had seen from "some distance" who had a beard and mustache and may have been wearing a hat on October 8, 1983. Nearly three months later, on August 23, 1990, this affiant called the investigator and told him

she was sure that the man whose photo she had been shown was one of the men she saw on October 8, 1983, when she drove by the B&B Ranch.

The remaining two affidavits are of an investigator hired by the petitioner. The investigator confirms that the four alleged killers suggested by the first affiant have bad reputations in the community. One of the killers allegedly bragged that he had once owned a Ruger pistol and used Julio Fiocchi ammunition. The investigator confirmed that many of the facts asserted by the first affiant, the girlfriend, were truthful as to the actual existence of the alleged four killers, but he did not add additional facts as to the truthfulness of the girlfriend's murder story.

The state habeas court found that the affidavits in support of petitioner's actual innocence claim lacked reliability. The trial court also noted that claims of actual innocence may support a claim for a new trial but will not support relief in habeas corpus proceedings. The Texas Court of Criminal Appeals denied relief based upon the trial court's factual findings and conclusions of law. *Ex parte Bower,* 823 S.W.2d 284, 287 n13 (Tex. Crim. App. 1991). Because these findings are not entitled to a presumption of correctness pursuant to *Perillo*, this court allowed the petitioner to develop this claim in the evidentiary hearing in connection with his ineffective assistance of counsel claim.

The rule in federal habeas proceedings has long been that the mere existence of newly discovered evidence relevant to the guilt of a state prisoner is not grounds for relief on federal habeas

corpus. The petitioner bears the burden of demonstrating the newly discovered evidence resulted in a constitutional infirmity in his conviction. *Townsend v. Sain,* 372 U.S. 293, 317, 83 S.Ct. 745, 759 (1963, *overruled on other grounds, Keeney v. Tamayo-Reyes,* 504 U.S. 1, 112 S.Ct. 1715 (1992). Federal courts have also recognized that "the passage of time only diminishes the reliability of criminal adjudications." *Herrera v. Collins,* 506 U.S. 390, 403, 113 S.Ct. 853, 862 (1993). Thus, claims of newly-discovered evidence which cast doubt on the petitioner's guilt several years after the convictions are not cognizable in federal habeas corpus petitions. *Herrera,* 506 U.S.at 404, 113 S.Ct. at 862 (1993).[3] In order to obtain relief in federal court based upon actual innocence, the petitioner must fit the claim within the "fundamental miscarriage of justice" exception. This means that petitioner must supplement "his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson,* 477 U.S. 436, 454, 106 S.Ct. 2616, 2627 (1986).

Against this legal backdrop, this court granted petitioner an evidentiary hearing on his claim that he received ineffective assistance of counsel. A summary of the testimony, in the order the witnesses were presented, follows.

Jerry Buckner, petitioner's trial counsel, was called first by the petitioner. Mr. Buckner at the time of petitioner's trial was an experienced criminal lawyer who was board certified in criminal

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[3] The dissent in *Herrera* proposed a "probable innocence" standard for reviewing claims of actual innocence. *Id.* at 444, 113 S.Ct. at 883 (1993).

law. Although he had never before defended a capital murder defendant, he had defended and prosecuted a number of murder cases as well as other criminal cases.

Buckner was in private practice in Weatherford, Texas. Buckner's neighbors included Mr. and Mrs. Lee Wreyford, who are the parents of Shari Bower, the petitioner's ex-wife. On January 16, 1984, shortly before petitioner was arrested and transported to Grayson County, petitioner contacted Buckner upon the advice of both Mr. Wreyford and Shari Bower to see if he would represent petitioner. After petitioner was arrested, Buckner agreed to represent petitioner for a retainer of $100,000. The work would be billed at a rate of $250 an hour, and the retainer would cover the first 400 hours spent on the case.

Buckner testified that he visited with the petitioner on at least two occasions that he can recall prior to the trial, while the petitioner testified there were three occasions. Buckner went to the Grayson County District Attorney's office and reviewed the file and the evidence against the petitioner. On February 17, 1984, Buckner arranged with the District Attorney's office to have petitioner and Shari Bower present with him when they reviewed the state's physical evidence in the case. Buckner used his wife, an adult probation officer with experience in reading police offense reports, and Shari Bower as legal assistants in preparation for the trial. Buckner filed a number of motions including a motion for appointment of an investigator. Judge R. C. Vaughn, the state trial judge, approved the appointment of Lester

Vance as an investigator. Mr. Vance was a recently licensed attorney in Grayson County and withdrew from the appointment because of a perceived conflict. On March 1, 1984, Buckner sought to have Shari Bower approved as an investigator in a letter to the county sheriff, which offered the benefit of frequent visits with her husband in jail and a capable assistant in trial preparation. During March of 1984, Buckner obtained court appointment of Sanford Frank, Ph.D., as an investigator/psychologist to assist Buckner. Dr. Frank is a psychologist who in 1984 was practicing in Weatherford, Texas. Dr. Frank went to the Grayson County Jail and administered a galvanic skin response test to petitioner in order to measure his emotional response to questions about his whereabouts on the day of the crime. Dr. Frank told Buckner that the results of the test showed deception on the part of the petitioner. Dr. Frank remained on the case as an advisor regarding jury selection and jury perception of the evidence.

Buckner continued in his preparation for trial. The trial was to begin on April 11, 1984.[4] Buckner interviewed the officers who investigated the crime. They included Weldon Lucas, a Texas Ranger, and Jim Blanton, a special agent with the Federal Bureau of Investigation, who were the two primary investigators of the

[4] This action was tried pursuant to the Speedy Trial Act that is no longer in effect in Texas. In 1987, the Texas Court of Criminal Appeals held the Texas Speedy Trial Act, codified in the Texas Code of Criminal Procedure art. 32A.01-02 unconstitutional for violating the separation of powers doctrine of Article II Section 1 of the Texas Constitution. *See Meshell v. State,* 739 S.W. 2d 246, 257 (Tex. Crim. App. 1987). Buckner stated it was his strategy to force the State to comply with the Speedy Trial Act and get the case to trial as quickly as possible.

various pieces of information and evidence that lead to the petitioner as the main suspect. Buckner visited the crime scene and interviewed officers and investigators who were at the hanger examining the crime scene. Buckner stated that he had either talked to all of the state's witnesses or he had written statements of those witnesses before going to trial. Buckner also talked to an ultralight dealer to get insight into the role the ultralight would play in the trial.

Buckner testified he discussed with petitioner and Shari Bower the right to testify at trial. Buckner was aware of the petitioner's version of the events should he decide to testify. Buckner discussed with the petitioner the discrepancies between petitioner's story and the state's evidence that would be brought out if petitioner did testify. After these discussions, Buckner said petitioner decided he did not wish to testify. Buckner noted that petitioner had told a number of different stories to different people regarding his involvement which ranged from "I have never been to Sherman," to the story petitioner had told his wife that he was going hunting, he went to Sherman, then to a hamburger restaurant and ate lunch, sat in a parking lot for several hours listening to a baseball game, then to the hanger, paid $3,000 as partial payment for the ultralight, watched while the ultralight was packed and put on top of his International Scout, proceeded back home, went through a drive-in near home and ate a hamburger, went to a gun range and hid the ultralight, and then went home to dinner. Petitioner had told Buckner that he had once owned a .22

Ruger pistol but had buried it in a rock cache in Colorado over a year prior to the murders. He had never sought to retrieve it until after he was arrested. A family friend went to look for the pistol and camping gear that had allegedly been hidden but could not locate anything beyond discarded trash. Petitioner told Buckner that he had smashed the ultralight engine and had thrown it in a field because he did not feel the engine was safe. When relatives went to look for the discarded engine, they could not find it.

At the time of trial, Buckner discussed with Shari Bower and the petitioner certain options regarding the course of action they would take. Buckner said he talked with and prepared for every witness he presented. Based upon petitioner's decision not to testify, Buckner did not prepare a direct examination for the petitioner. Buckner noted that "we would have got ripped on cross if Les Bower had testified."

Concerning billing, Buckner stated that he spent more time on the case than the 407 hours he billed, and he was never paid the total amount of the original retainer. This fact resulted in the filing of a legal action against Wreyford for the debt.

Dr. Sanford Frank testified that he administered some initial psychological screening to petitioner and the galvanic skin response test. Dr. Frank assisted with jury selection in the case and evaluated jury perception during the trial.

Gayle Baucum testified that he is Shari Bower's uncle and a Baptist minister. Reverend Baucum had visited with Bower on at

least two occasions close to the time of the crimes and had noted that Bower behaved normally. Rev. Baucum visited with Bower on the night he was placed in the Grayson County Jail. Bower told Rev. Baucum his version of the events whereby he had purchased the ultralight with a $3,000 down payment and left to return home to Arlington before the murders occurred. Rev. Baucum relayed this story to Shari Bower and Buckner. On January 30, 1984, Baucum again visited with Bower and had him write down the story that had previously been relayed. During the trial, Baucum did not believe things were going well and approached Buckner. Baucum told Buckner that he believed he should call both Bower and Baucum as witnesses. However, Rev. Baucum was not aware that Bower had given inconsistent statements regarding his involvement with the murder victims and his whereabouts on the day of the murders. Finally, Rev. Baucum noted that on the night after Bower was convicted he observed that Buckner had been drinking.

Lee Wreyford testified that he contacted Buckner in January of 1984. Wreyford retained Buckner on Bower's behalf with an initial $15,000 and gave him an additional $22,500 prior to trial.[5] Wreyford, at the behest of Buckner, contacted a man named Runnels, who frequented a U-haul rental place in Sherman. Runnels allegedly had knowledge concerning illegal drug activity of several of the murder victims; however, Buckner decided not to call him as a witness according to Wreyford.

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[5] Buckner ultimately received approximately $67,000 of the contracted $100,000 retainer.

Wreyford testified that he was staying at the same hotel as Buckner and observed Buckner with an alcoholic drink every day after trial. On the Friday that Bower was convicted, Buckner appeared to be drunk, according to Wreyford. The punishment phase commenced on the following day.

Upon cross-examination, Wreyford testified, as was noted at trial, that his home had been burglarized prior to the 1983 murders and several firearms were stolen. One of the firearms was subsequently found to be in Lester Bower's possession.

Shari Bower testified that she was married to petitioner during the time of the murders, but subsequently divorced him even though they have remained close. Shari recalled that on October 8, 1983, petitioner left at 6:30 a.m. to go look for a place where he could go bow hunting. Petitioner returned between 6:30 p.m. and 7:00 p.m. Petitioner did not act unusual upon his return, according to her. On January 13, 1984, the Federal Bureau of Investigation contacted petitioner concerning phone calls to one of the victims. Shari suggested petitioner talk to an attorney. Petitioner talked to Buckner on January 16, and retained him on January 23 after his January 20 arrest. Shari spent two weeks with Buckner's wife, cataloging and organizing files in preparation for the trial. On January 23, Shari went with Buckner to visit the petitioner.

Shari asserts that Buckner did not interview family members, hire an investigator, or seek a local attorney to assist in the case. Shari testified that Buckner did not prepare witnesses and

did not adequately investigate the case in her opinion. Shari believed that petitioner would be called as the last witness during the guilt/innocence phase and was surprised when Buckner rested without calling petitioner. Shari noted that Buckner would often have a drink at the end of each trial day while sitting around the pool in the evening. On the evening after the guilty verdict was returned, Buckner appeared intoxicated to her.

Evelyn Staples, Lester Bower's aunt, testified that there were leads that she believed Buckner should have followed up on but did not. Specifically, she says she received a note from defense counsel table during trial to call the Sturm-Ruger Company with a question relating to the shape of the firing pin of a Ruger pistol. She says she did this and passed her note with the answer back to the counsel table, but Buckner never used the information. She also said she could have testified as a character witness for Bower.

Denise Knippa, petitioner's sister, testified that there were ten or twelve different family members giving advice to Buckner regarding the trial. Mrs. Knippa researched the availability of Julio Fiocchi ammunition and presented this research to Buckner. Although she thought it was helpful, Buckner did not use the material gathered. Knippa also thought it unusual that Buckner did not object to an FBI agent juggling oranges during the testimony of the witness who ran the fruit stand.[6] Knippa stated she saw liquor

[6] Buckner stated he did not object because he believed the jury had seen through the act, and he intended to use it during his argument to the jury to show the lack of professionalism of the

bottles in Buckner's room. Further, she says she could have testified as a character witness for Lester Bower.

Mike Smiley, Lester Bower's brother-in-law, testified that he attended almost the entire trial. He said that he and Lee Wreyford met with a man named Runnels who supposedly had information on drug activities of one or more of the murder victims. Smiley said Runnels offered to testify; however, Buckner did not call Runnels as a witness at trial. Smiley also testified that he and his wife went to Buckner's hotel room one evening to tell him that they did not like the way the trial was going. He also said he observed bottles of liquor in Buckner's room. Smiley said he was not called as a character witness for Bower, but had he been called, he would have testified that Bower is "a good guy, good friend." Finally, Smiley admitted that it would not have been wise to put Lester Bower on the witness stand if it were true that he had given different stories to different people about the events surrounding these murders.

Ed Hueske, a ballistics expert, testified that there were many other brands of .22 caliber firearms in addition to those weapons listed by the state's witnesses at Bower's trial that could have fired the cartridge cases and bullets found at the crime scene. Hueske based this upon a current FBI database.[7] Hueske also noted that there are only two reasons to buy sub-sonic ammunition. He

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agent.

[7] It remains unclear whether this database was available to the investigators nineteen years ago.

said one reason is for noise abatement, and one reason is to use in a silenced weapon. He further testified that there is no reason to have either sub-sonic ammunition or a silencer for hunting or use at a shooting range.

Eric Holden, a polygraph expert, testified that the galvanic skin response test simply gauges skin surface changes in temperature, and in the hands of an untrained test administrator, it would be of little value. Holden said that such a test alone does not indicate the accuracy of a person's response, but it does measure emotional reaction.

Loren Halifax testified that she was 15 years old at the time of the trial, and a friend of the petitioner's family. Halifax testified that Buckner propositioned her one evening during the trial. Halifax did testify during the punishment phase and told the jury about Lester Bower's sense of humor, his love of the outdoors and camping, and that he was not a threat to society. She said that Buckner did not tell her ahead of time what questions he would ask her.

Cheryl Smiley, petitioner's sister, testified that she visited with Buckner during the trial about her concerns regarding how the trial was going. Smiley testified at the punishment phase that she did not believe her brother was a threat to society, and he was a loving, kind, Christian man.

Arnold Isenberg, a former sheriff in Oklahoma, who is presently a truck driving instructor, testified that he knew of the

reputations of "Bear," "Lynn" and "Rocky"[8] and that they were involved with a group of people who were operating methamphetamine labs Southern Oklahoma. Isenberg testified that one of the houses that the group occupied burned down in the latter part of 1982, and the group moved out of the area. He said all three men were dangerous and capable of murder.

Witness # 1 testified that she was "Lynn's" girlfriend during the time of the murders, and she believed Lynn played a part in the murders. She testified that on October 9, 1983, she drove with Lynn from Hillsboro, Texas, to Lexington, Oklahoma. According to her, when they passed through Sherman, Lynn got down low in the seat and stated that he had killed some people the day before in Sherman in a drug deal that went bad.[9] Approximately a week later, she overheard Lynn and another man named "Ches" bragging about the killings and how they had stolen an ultralight.[10] Witness # 1 last saw Lynn in February of 1984 when she walked out on him while

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[8]The identities of those individuals listed by nicknames as the alleged alternate perpetrators of these murders, and the two witnesses whose identities remain under seal will be discussed in the manner they were referred to during the hearing. Their true identities are in the record under seal.

[9] This court notes that to drive to Lexington, Oklahoma, from Hillsboro, Texas, one would normally travel north on Interstate 35 to an exit a few miles from Lexington. When asked why they went as far east as U.S. 75 and drove through Sherman, Texas, witness # 1 stated they went through Kingston, Oklahoma, north of Sherman, Texas, to get to Lexington, and she was not paying attention to how they got there. She only knew they had gone through Sherman.

[10] Neither party secured the presence of Ches, Lynn, Rocky, or Bear for the purposes of this hearing. In addition, there is no evidence that more than one ultralight was stolen from the crime scene. Pieces of Tate's ultralight were in the possession of the petitioner prior to his arrest.

living in Arkansas. Witness # 1, who has a criminal record, said she first told this story in 1984 to a person designated as Witness # 4 with whom she attended Narcotics Anonymous sessions.

Witness # 2 testified that she was driving by the B&B Ranch at 5:38 p.m. on the evening of October 8, 1983. She stopped at the entrance to the ranch to adjust her son in a car-seat and saw six or seven men standing beside a building covered with yellowish-beige tin. Witness # 2 saw a tall man with a beard and mustache turn and look at her, and she saw another sandy-haired man. She also saw a Bronco or Blazer. Witness # 2 then drove away.

The following morning, Witness # 2 read about the murders in the local newspaper. She realized she had been at the scene of the murders and told her husband, who is now deceased, about the event. She allegedly told two other people about being at the ranch, but one has suffered a mental breakdown and the other has never been called to verify Witness # 2's version of the events. Witness # 2 testified that she called the FBI in March of 1984 to report her story. Witness # 2 asserts that she went in and talked to FBI Agent Blanton in April of 1984 and told him her story.[11]

Other evidence received by the court, including photographs of the B&B Ranch, indicates that there was no building covered in yellowish-beige tin near the front of the B&B Ranch that could be seen from the road. The building to which Witness # 2 refers was a building that was a half mile from the entrance and could not be

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[11] Parts of her story are refuted by the later testimony of Blanton and by his official report.

seen from the road. The only building near the road was a house that was under construction, which would be difficult to confuse with a yellowish tin airplane hanger. Even if Witness # 2's version of the events were correct as she reported it to agent Blanton in 1984, that version demonstrated that a tall, dark-haired, bearded man was present with several others, and a vehicle similar to an International Scout was present. This comports with a description of petitioner and the vehicle he was driving that day.

The petitioner testified at the evidentiary hearing. He stated that, due to a painful attack of kidney stones while backpacking in August of 1982 in the San Juan Mountains of Colorado, he buried his .22 Ruger pistol in the mountains in order to lighten his load. He testified that he later moved to Texas and bought the ultralight from Tate as he had told Rev. Baucum. Petitioner stated that on September 30, 1983, he talked to Philip Good's wife concerning the ultralight, and on October 3, 1983, he talked to Philip Good and agreed to meet him in Sherman on October 5, 1983. On October 5, 1983, he went to Sherman and met Good at the Holiday Inn.

Petitioner and Good proceeded in separate vehicles to the B&B Ranch. When they arrived at the ranch, Bob Tate was mowing with a tractor. Petitioner noted that the hanger was not visible from the road that runs in front of the B&B Ranch. Petitioner noted that a house and garage were being built near the road. When petitioner and Good arrived at the hanger, they discussed ultralights and petitioner's weight as a factor that might prohibit him from flying

ultralights. Bob Tate came into the hanger and stated he had an ultralight for sale for $4,500. Petitioner then departed the B&B Ranch.

Petitioner further stated that on October 7, 1983, he called Good who agreed to meet him on October 8, 1983, at 3:00 p.m. Petitioner wanted to tell his wife that he was going to build an ultralight, but he did not want to disclose he was thinking of purchasing one. Instead, he told Shari he was going bow hunting. At 5:30 a.m. on October 8, petitioner proceeded to the Arlington Sportsman Club for archery practice and left there at approximately 8:30 a.m. to drive to Sherman. Petitioner arrived in Sherman at approximately 11:00 a.m. and ate lunch at a hamburger restaurant. Petitioner said he then sat in a parking lot for approximately three hours listening to a baseball game on the radio. Petitioner left the parking lot at 2:15 p.m., and he arrived at the B&B Ranch at 2:30 p.m. He testified he had $3,000 he had received selling drilling fluids as a part-time second job. Philip Good was there and stated they would have to wait until Bob Tate got there to open the hanger.[12]

The petitioner further stated that Tate arrived at 3:00 p.m., entered through a side door, and the three of them talked about the ultralight. Tate said he would take $4,500 for the ultralight. Petitioner offered $3,000 and an IOU for the balance written on his

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[12] The district attorney's notes, Petitioner's exhibits 10d and 10u, demonstrate that Good had keys to the hanger and there should not have been any reason for him to wait for Tate to open the hanger.

business card. Tate agreed, and he, Good, and Jerry Brown began disassembling the plane. The petitioner stated that the plane was disassembled in approximately 30 minutes and tied down on his International Scout. Petitioner left the B&B Ranch at approximately 4:00 p.m. He proceeded to the Arlington Sportsman Club where he hid the ultralight in tall grass. Petitioner then went to a "burger joint" and then home.

Petitioner said he read about the murders in the Ft. Worth newspaper either the next day or the day after that and realized they had occurred at the place where he had bought the ultralight. Despite this, petitioner continued with his plan to build the ultralight without telling anyone he had been to the scene where four people were murdered shortly after he left. Petitioner testified that he destroyed the ultralight motor and ditched it in a field because he believed it was not safe to carry his weight.

On January 9, 1984, two FBI agents, following up on phone records connecting calls to Philip Good's phone number and charged to petitioner's business telephone credit card, came to petitioner's office. They asked him about being in Sherman or contacting Philip Good. Petitioner testified he admitted he had called Philip Good, but because he had lost interest in the ultralight, he denied ever going to Sherman to meet him. On January 11, 1984, the same two agents came to Bower's office to ask more questions. Petitioner again told the agents that he had not made any appointment to go to the Sherman area, he did not buy an

ultralight from Philip Good, and he did not know where the stolen ultralight could be found.

After this latest interview, the FBI agents called petitioner to ask if he would take a polygraph examination. Petitioner agreed to come to the FBI office in Dallas. On Friday, January 13, 1984, petitioner arrived at the FBI office but refused to take a polygraph. Petitioner testified he stated for a third time that he had called Philip Good but that he did not go to Sherman to meet Philip Good, he did not buy the ultralight, and he did not know where the ultralight could be found.

On Monday, January 16, 1984, petitioner consulted with attorney Jerry Buckner. The petitioner testified that after he was arrested on January 20, 1984, he told Rev. Baucum during a jail visit his current story about what had happened on October 8, 1983. This story was relayed to Buckner, and on February 4, 1984, petitioner wrote the story down. Petitioner says he met with Buckner only three times before trial for a total of three hours. On April 2, 1984, petitioner says Dr. Frank visited him and administered some psychological tests and a biofeedback test using a machine with a "Radio Shack" label on it. Petitioner further stated that Buckner did not visit with him in the evening when he was returned to the jail at the end of each day of trial.

Petitioner said he did not tell Buckner he wanted to testify but assumed that he would. Petitioner testified he and Buckner agreed to postpone the decision about whether he would testify until after the state's evidence was presented in the

guilt/innocence phase. Petitioner stated he was surprised when he was not called to testify, and the defense only lasted two hours.

Upon cross-examination and questioning by the court, petitioner stated he had bought a barrel vise and site adjustment tool from Catawba Enterprises. Further, petitioner did not recall the name of the urologist he consulted after his kidney stone problem in Colorado, which required him to bury his .22 pistol although he did carry out other gear from the mountains. Petitioner told the FBI agents that he did not own a .22 caliber handgun. He did however go into some detail with investigators about the other guns he owned, including the caliber, make and model number of each gun. Petitioner asserted he was shooting a .22 rifle and not a .22 pistol when he signed in at the Arlington Sportsman Club range for target practice nine days before the murders. Petitioner further testified that he bought Julio Fiocchi ammunition once out of curiosity.

Gary Dawson testified that he is a civil lawyer in Oklahoma and a friend of petitioner. Mr. Dawson sent a letter to Buckner offering his assistance. Dawson thought Buckner should have sought a change of venue, and he observed that Buckner seemed to be "grandstanding" during the trial.

Robert Triplett testified that he was a boyhood friend of petitioner, and if asked he would have testified that he did not believe petitioner was capable of killing. Triplett was not told about the trial because petitioner's family was embarrassed about the charges and did not contact Triplett prior to the trial.

James Widmier, who owns an archery shop in Colorado, testified that he looked in the mountains for the .22 Ruger pistol that petitioner contends he hid in a cache. Widmier stated that petitioner did not ask him to look for the items until February of 1984, after petitioner's arrest. Widmier said he located the cache, but the only items he found in it were a propane bottle, a knife and spoon, and pieces of a blanket.

Billy Carothers testified that he was living in Denison, Texas, in 1982. Carothers worked as an auto repossession man. Carothers said he knew that Bob Tate was involved in narcotics trafficking. Carothers said Monty Tate, Bob Tate's brother, was a car dealer for whom Carothers sometimes worked. Bob Tate asked Carothers to pick up narcotics in Pilot Point, Texas, on several occasions during 1982.[13]

The petitioner's last witness, whose name is under seal and whose affidavit is marked as Petitioner's Exhibit 23, was designated as Witness # 4. This witness testified that in 1984 he was a member of the same Narcotics Anonymous group that included Witness # 1. He said that Witness # 1 told him in 1984 that Witness # 1's boyfriend "Lynn" had said he and his friends had murdered some people on October 8, 1983, over a drug deal. He testified that Witness # 1 believed her boyfriend Lynn may have

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[13] Carothers was interviewed by investigators in December of 1983. At that time, Carothers said he had delivered cocaine on one occasion three years previously for Tate. Carothers refused to take a polygraph and refused to sign a statement. The investigator reviewed the story and Carother's criminal record and opined that Carothers was fabricating the story.

been referring to the same murders that Lester Bower was convicted of committing.

The respondent presented James Blanton, one of the FBI agents who investigated the murders. Blanton stated that the FBI became involved on October 9, 1983, in order to assist local law enforcement officers with the investigation. Blanton testified that the FBI traced calls to Philip Good's home from a library, a service station, and petitioner's employer's office, all charged to petitioner's company telephone credit card. Blanton said Bower admitted making the phone calls to Philip Good's home, but said he lost interest in the ultralight aircraft about which he called Good and never pursued the matter further. Blanton also said the FBI was aware of information about Billy Carothers and followed up on the information, but it did not lead to anything. Blanton stated that when petitioner was first interviewed, he said he did not know where he had been on October 8, 1983, and denied ever being in Sherman or owning a Ruger .22 caliber pistol. On January 13, 1984, petitioner refused to take a polygraph, and when Agent Blanton told petitioner that he was going to his house to question petitioner's wife, petitioner stated "I would not go there if I were you."[14] While the petitioner was away visiting Rev. Baucum, Agent Blanton and two Texas Rangers went to petitioner's home to interview Shari Bower. Through the garage windows of Petitioner's home, they observed what appeared to be ultralight tubing in the garage. No

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[14] Petitioner subsequently went home and allegedly took a trip to Gayle Baucum's home.

one was at the home, and Agent Blanton left. Subsequent investigation revealed that petitioner had purchased Fiocchi .22 caliber ammunition. Eleven spent shell casings of Julio Fiocchi .22 caliber ammunition were found on the hanger floor at the scene of the murders. Subsequent investigation further revealed that a silencer had been used on the .22 caliber weapon that fired the bullets. At the January 20, 1984, search of petitioner's home and automobile, a letter from Catawba Enterprises, which sells firearm silencers, was found in a briefcase in the automobile. Also, an Allen wrench that fits a Catawba silencer for a .22 caliber RST 6 Ruger pistol was found along with a firearms record showing that petitioner had purchased an RST 6 Ruger.

Agent Blanton stated that Witness # 2 was interviewed on May 10, 1984, and she stated then that when she drove past the B&B Ranch on October 8, 1983, she saw three men, not six or seven, standing in the distance, and she could not identify any of the individuals. Agent Blanton had asked Witness # 2 whether, if she were shown photographs, she could identify any of the men. She stated that she did not think she could identify anyone. Agent Blanton also testified that it is not possible to see the airplane hanger described by Witness # 2 from the road due to the topography of the land at the B&B Ranch.

Ronald Sievert, the assistant U.S. attorney who helped prosecute petitioner, testified concerning his belief that Buckner did an effective job defending petitioner.

This court then recalled Jerry Buckner to the stand for additional questions. He testified that he pursued a "time and proximity defense" which was designed to show that the state could not prove the petitioner was at the B&B Ranch at the time the murders were committed. Buckner also attacked the search based upon lack of probable cause. Buckner related to the court that, although the ultralight's wings were never recovered, pieces of ripped or torn wing tie-downs were recovered from the scene of the crimes. Buckner noted that this evidence at the airplane hanger where the murders occurred indicated that someone had cut or ripped the tie-downs from the wings of the stolen ultralight in an effort to hurriedly get away. This evidence was inconsistent with Bower's story that the plane had been neatly folded and packaged for transportation after Bower purchased it from Tate. Buckner said he believed that if Bower had chosen to testify, he would have faced cross examination on this inconsistency as well as questions about why he had lied several times to the FBI when asked whether he had owned an RST 6 Ruger .22 caliber pistol, whether he had been to Sherman on October 8, 1983, whether he had purchased an ultralight from Tate and Good, and whether he had any information on the whereabouts of Tate's ultralight.

Buckner stated that Bower agreed that if Bower had taken the stand, he would have given up his only viable defense. Buckner further testified that he knew Bower had a right to testify "and it was his decision as to whether to testify or not, and I did not force that down anybody's throat, and I never have, and I never

will." This court finds Buckner to be a credible witness and that the petitioner, Lester Bower, made the decision himself on whether or not to testify. Therefore, Buckner's trial strategy, which was to focus on what the state could not prove, was a reasonable option for Bower and Buckner to choose and does not demonstrate ineffective assistance of counsel.

Buckner testified he talked to each punishment witness and prepared for the punishment phase before jury selection. Buckner did state that he had drinks every night after trial, and he set up what he called a "hospitality suite" in his room because he was staying at the same hotel as the rest of the family. However, Buckner denied that he ever propositioned anyone, including Loren Halifax, for sex.

Buckner noted that there was an open file policy within the Grayson County District Attorney's Office, and he received everything the state had. Buckner testified that he did not feel it was necessary to retain his own ballistics expert in an attempt to counter the state's ballistics expert on the identification of the shell casings as Fiocchi sub-sonic ammunition or on the types of .22 caliber weapons that could have fired those shells. He did not believe that the use of sub-sonic as opposed to ultrasonic bullets was necessarily suspicious. He also did not believe that testimony from the state's ballistics expert limiting the types of weapons used to fire the recovered shells to three, including an RST 6 Ruger .22 caliber pistol like the one Bower had owned, was damaging. Buckner stated "there are probably thousands of Ruger

semiautomatic .22's floating around, any one of which could have been the one."

Buckner testified he went through each part of the petitioner's story. Buckner related told how he had asked petitioner where he had gotten the $3,000 cash he said he used to buy the ultralight, and petitioner could not explain it other than to say he had stashed it away. Buckner noted that there was a community rumor that the murder victims were possibly involved in dealings with illegal drugs, but Buckner could not find any witnesses who would lend credence to this theory. Witness # 1, #2, and # 4 had not come forward and told their stories at that point. Also, Buckner chose not to pursue any further the story of a man named Runnels who had called Buckner. Buckner asked Lee Wreyford and Mike Smiley to go to a U-Haul rental place where Runnels allegedly could be found. Wreyford and Smiley did so and talked to Runnels, who, according to them, offered to testify. Neither Wreyford, Smiley, nor Buckner testified as to when Runnels called Buckner or exactly what Runnels would have said if he had been called as a witness and if his testimony had been held to be admissible by the state trial judge. However, because of the community rumor, Buckner did not seek a change of venue hoping that some jurors may have heard the rumor and might give Bower the benefit of the doubt.

Buckner stated that he talked to petitioner, Shari Bower and the rest of the family concerning trial strategy. Buckner did not dwell on the choice of punishment phase witnesses with the family

until after the guilty verdict because he wanted everyone to remain optimistic on the issue of guilt or innocence. Buckner had a list of potential witnesses for punishment and pared it down the night before the punishment phase of the trial was to begin. Buckner's strategy was to avoid repetition by emphasizing quality rather than quantity of punishment witnesses in order to demonstrate to the jury that petitioner was a good person. Buckner stated that he knew what each of his witnesses would say from talking to the petitioner, compiling notes of expected testimony and then talking to the prospective character witness. Buckner noted that there was no mitigation evidence available beyond good character.

Upon cross-examination, Buckner admitted that in his motion to suppress the evidence he cited no cases in support of the motion, and he forgot to bring to the suppression hearing a certain photograph. This photograph supposedly demonstrated that the law enforcement officer who looked through the garage door windows and saw the ultralight aircraft tubing in Bower's garage could not have seen the tubing without standing on his tiptoes. Buckner noted that forgetting the photo he had taken was a mistake for which he took responsibility. However, Buckner did not believe it necessary to cite cases in his motion because the law was well settled, and the experienced trial judge was familiar with Fourth Amendment jurisprudence.

Buckner testified that at the close of the trial and after the punishment verdict, petitioner had a strange look in his eyes and smiled and stated "they never found the rest of the ultralight,

it's in the attic at my house." Buckner stated that was the first time he knew that Bower had hidden the wings of the ultralight in the attic of his house. Buckner said he never repeated this statement to anyone because the trial was over, and he, therefore, felt no duty to reveal it to the prosecution.

Buckner did regret that he did not seek a continuance between the guilt/innocence phase and the punishment phase. However, even in hindsight, he did not believe there was other evidence that could have been presented during the punishment phase.

Buckner said he felt like three jail visits with the petitioner prior to trial were adequate because he had sufficient time during jury selection, where jurors are questioned and picked one at a time over a period of days, to talk to the petitioner. Buckner stated that he spent much of his time before trial studying the state's evidence, reading Texas Court of Criminal Appeals opinions on capital murder cases, and reading manuals on capital murder defense.

When questioned by the court about whether he thought in hindsight it might have been fruitful to hire an investigator to look into the possible drug involvement of the murder victims in an effort to identify a motive that someone else might have had to commit these murders, Buckner stated that he decided not to do so because "all we had was rumors." He said law enforcement officers had not been able to make an arrest, and "it seemed very remote that [by] hiring a private investigator, [he] would be able to come up with more than the local law enforcement officers." The court

finds this explanation by defense counsel supports a reasonable limitation on investigation into this matter.

Notwithstanding the publicity in Sherman about the murders, Buckner stated that a change of venue was unnecessary because the parties and the court were able to select a qualified jury.

Ineffective Assistance of Counsel

The United States Supreme Court has established the test for and the proof necessary to demonstrate an ineffective assistance of counsel claim. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In order to show that counsel was ineffective, a petitioner must demonstrate:

> first... that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted in a breakdown of the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In order to demonstrate the second prong of the above-stated test, a petitioner must demonstrate that counsel's deficient performance so prejudiced the defense that petitioner was denied a fair and reliable trial. *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838 (1993). Simply put, in order to establish prejudice, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Strickland v. Washington,* 506 U.S. at 694, 104 S.Ct. at 2067.

A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins,* 950 F.2d 1054, 1065 (5th Cir. 1992).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon petitioner, who must demonstrate counsel's ineffectiveness by a preponderance of the evidence. *Martin v. Maggio,* 711 F.2d 1273 (5th Cir. 1983). In determining the merits of an alleged Sixth Amendment violation, a court "must be highly deferential" to counsel's conduct. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Courts have recognized that there is "the tendency, when all else fails, to blame the lawyer." *United States v. Faubion,* 19 F.3d 226, 232 (5th Cir. 1994). The acuity of hindsight is not the proper lens through which to view alleged errors on the part of counsel. *Id.*

In the ninth ground for review, Bower contends his counsel was ineffective for four reasons. He alleges that counsel failed 1) to investigate the facts surrounding the charges against petitioner; 2) to prepare for trial; 3) to call witnesses during the sentencing phase, having made an agreement to limit the number of witnesses; and 4) to know, understand, and apply relevant law, consequently, failing to identify and present relevant mitigation evidence.

Failure to Investigate, Know the Law, and Prepare for Trial

Petitioner makes several claims regarding counsel's alleged failure to properly investigate the facts, know the law and prepare for trial. Among these claims, petitioner suggests "A reasonable investigation by trial counsel would have established that 1) the word 'Tate' was inscribed on the wheel after it was seized from Mr. Bower's garage; 2) the 'Allen' wrench was not found in Mr. Bower's briefcase as Gary Robinson, a Grayson County deputy sheriff, testified (Apr. 23, Tr. 43-49); and 3) Catawba Enterprises did not sell Mr. Bower tubing for a silencer as the State alleged." (Memorandum p. 74-75).

This court conducted a five-day evidentiary hearing, and the petitioner's earlier assertion that the word "Tate" was scratched on the tire after it was seized appears to have been abandoned at this point because petitioner no longer contends that this evidence was fabricated. The testimony that an Allen wrench, which could be used to mount a Catawba silencer to a pistol, was found in Bower's briefcase has never been established as false, even though the police inventory did not list the wrench. Petitioner has not established that he bought a barrel vise and sight adjustment tool from Catawba, and the testimony that 99% of Catawba's sales were of silencer tubes has not been contradicted.

There is no evidence to support these three allegations. Mrs. Tate testified at trial that Mr. Tate had marked the wheels prior to his murder because he previously had been a crime victim and

wanted to protect his property (SF XI 72-73).[15] Gary Robinson did not testify about finding an "Allen" wrench. Detective Robinson testified that he investigated the murder scene, took pictures and followed up leads (SF XI p. 74-108). The "Allen" wrench was found in the "right-hand corner of the briefcase, in the little carrying case, right against the back" by Texas Department of Public Safety Intelligence Officer, Sergeant Ted Kort, and handed over to Texas Ranger Weldon Lucas as the evidence custodian (SF XIV p. 9-15). The only time Robinson had any involvement with the "Allen" wrench was when he was part of a courtroom demonstration to show that the wrench fit a Catawba silencer (SF XVI p. 48). The state could not prove that Bower had, in fact, bought a Catawba silencer. What the state did prove was that Bower was in possession of a letter that accompanied all Catawba silencers, and silencer sales were 99% of Catawba Enterprises' business. Furthermore, there were no records remaining that could definitively prove or disprove the fact of the purchase by Bower of the silencer (SF XVI p. 25-29).

Petitioner challenges the level of investigation of this case by counsel. The evidentiary hearing demonstrated that counsel followed up on leads as they were furnished to him and thoroughly reviewed the state's evidence. Counsel also visited the crime scene and interviewed law enforcement officers who would be called to testify against petitioner. The contract that Buckner entered

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[15] The trial court sustained defense counsel's hearsay objection concerning the marking of the wheels. But in light of Bower's present police conspiracy theory, this testimony is relevant.

into with Bower provided that the petitioner would be required to pay the costs of an investigator if he wanted one. Buckner did not actively seek the appointment of an investigator nor did he actively investigate the rumors that one or more of the murder victims were involved in drug trafficking. The information that could have been derived from this potential investigation is speculative. What is known is that there was one witness by the name of Runnels who could have been questioned by Buckner according to Lee Wreyford and Mike Smiley. Buckner testified that he did not specifically recall whether he talked to Runnels at the time of the trial. Buckner did state that "all we had was rumors and the rumors had been floating around Grayson County for a while about different drug deals and the law enforcement officers had not been able to make an arrest or put the finger on anybody. It seemed very remote that hiring an investigator would be able to come up with more than the local law enforcement officers."

The court notes that "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Furthermore, ". . . strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." *Id.*

Here, it is unclear what Runnels knew or would have testified to had he been called as a witness at Bower's trial. Runnels was not called at the evidential hearing held by this court, and evidence was not presented to show that he was unavailable. Even if Runnels had testified at trial that the murder victims were involved in a risky occupation like drug dealing, such testimony would not have pointed the finger at an alternative perpetrator of these murders. This court finds that Buckner's choice not to further investigate Runnels's story does not show that Buckner's performance was deficient under the first prong of *Strickland.* Moreover, even if it could be said that Buckner's investigation on this point was deficient, Bower has not shown that such deficiency prejudiced the defense under the second prong of *Strickland.*

The prejudice prong requires the petitioner to demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Strickland* 466 U.S. at 694, 104 S.Ct. at 2068. The state presented strong circumstantial evidence that the petitioner committed the four murders at the B&B Ranch on October 8, 1983. As previously noted, petitioner's current version of his activities in the days leading up to the murders and on the day of the murders is not consistent with the version he repeatedly gave to FBI agents and other law enforcement agents when interviewed. It is also not consistent with the physical evidence showing that the tie-downs on

Tate's ultralight had been cut or ripped off the wings. In addition, the circumstantial evidence showing petitioner's possession of parts of Tate's ultralight, petitioner's destruction of the ultralight engine and tubing decals, his orders of Fiocchi .22 ammunition, his possession of both a letter from firearm silencer manufacturer Catawba and literature on firearm silencers, as well as other evidence, all show that there is no reasonable probability that the result of the proceeding would have been different.

Failure to Call Witnesses

Petitioner claims his trial counsel rendered ineffective assistance when he entered into a stipulation with the prosecution that effectively limited the number of mitigation witnesses. Buckner noted during the evidentiary hearing that, if he did enter into such a stipulation, he was not giving up anything because the number of witnesses he called was the number he planned to call in the first place. Buckner wanted to show various aspects of petitioner's life and wanted to avoid repetition. Counsel made a strategic decision to limit the number of witnesses and thus counsel's representation was not ineffective. This claim is without merit and will be denied.

In a related claim, petitioner asserts counsel was ineffective in his presentation of mitigation evidence because he did not know the law regarding mitigation. Buckner outlined in his affidavits and in his testimony his preparation and his research on

mitigation. Buckner was aware that he could present any facet of petitioner's background that could have an impact upon the jury's sentencing decision. Buckner was also aware that, other than good character, there was no specific mitigation evidence available to present.

In *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495 (2000), the United States Supreme Court held that, consistent with *Strickland,* an attorney is ineffective when he fails to present "substantial" mitigation evidence in consideration of punishment. In the *Williams* case, this included mistreatment and neglect as a child, borderline mental retardation, the defendant's assistance to authorities in prison and testimony from prison officials that the defendant was among the inmates who were the least likely to act in a violent, dangerous or provocative way. *Williams v. Taylor,* 120 S.Ct. at 1514-15.

In Bower's case, there was no such mitigation evidence available other than his lack of a prior criminal conviction and his good character. Counsel was not deficient in his presentation of mitigation evidence on behalf of the petitioner.

Full and Fair Hearing

In ground for review ten, petitioner alleges he was denied a full and fair opportunity to litigate his Fourth Amendment claim due to defense counsel's ineffective assistance.

Petitioner's house was searched on January 20, 1984. Prior to that search, two officers went to petitioner's house on

January 13, 1984, to talk to his wife about what she remembered about petitioner's activities on October 8, 1983. While approaching the front door, the officers observed aluminum tubing in petitioner's garage. The garage was closed, but the officers saw the tubing through an uncovered window. Bower alleges this was an unlawful search, thus voiding the basis for the January 20, 1984, search warrant.

At the suppression hearing, Buckner argued that the garage was not in "plain view" and questioned one of the searching officers, Weldon Lucas, extensively about the pre-warrant viewing of the garage contents. The petitioner points out that counsel did not, however, cite any cases in his suppression motion and forgot to bring the key photograph that he wished to introduce in an attempt to demonstrate that the officers could not see into the garage on the way to the front door of the house. This court researched the issue to determine whether there were cases prior to 1984 which support the proposition that, while walking past the garage at the home of a person who has become a suspect in a homicide, the officers would violate the Fourth Amendment by looking in the garage windows. The court was unable to find cases that support this contention, and there are a number of cases where officers either climbed up on tires to look in a back yard, went into a back yard and stooped to look in a basement window or otherwise looked into the premises from normal means of access to and egress from the house. *See United States v. Anderson,* 552 F.2d 1296 (8th Cir. 1977); *United States v. Hersh,* 464 F.2d 228 (9th Cir.), *cert.*

denied, 409 U.S. 1008, 93 S.Ct. 442 (1972); *United States v. Wheeler,* 641 F.2d 1321 (9th Cir. 1980); *Lorenzana v. Superior Court,* 511 P.2d 33 (Cal. 1973). Thus, a good reason for not citing cases is a dearth of cases in support of your novel argument. Also, Buckner testified that he was confident the experienced state trial judge was familiar with Fourth Amendment law. Additionally, the photo that counsel failed to introduce shows a readily viewable garage window which is along the path to the front door of the house. The introduction of the photo would have been less persuasive in support of the motion than the hand-drawn exhibit that was admitted.

Counsel was not deficient in failing to cite cases in his brief or introduce the photograph during the suppression hearing. This claim is without merit.

Additionally, the Supreme Court has held that once a "full and fair" hearing has been conducted by a state court on a Fourth Amendment exclusionary rule claim, a petitioner is precluded from relief in federal habeas corpus proceedings. *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037 (1976).

During the suppression hearing, Buckner presented petitioner's wife who testified that the garage window was too high to facilitate an easy viewing of the contents of the garage. Counsel further questioned Texas Ranger Weldon Lucas concerning his actions in viewing the garage and obtaining the warrant. It is clear that Buckner was familiar with the law on searches and seizures. Furthermore, the probable cause determination for the

search warrant was based upon many different factors in addition to the garage window viewing of the aircraft tubing. This claim is without merit and will be denied.

Texas Sentencing Scheme

In the third ground for review, petitioner asserts that the former Texas capital sentencing law is unconstitutional. Specifically, petitioner alleges that the former sentencing scheme 1) prevented jury consideration of mitigating evidence; 2) misled the jury concerning the jury's responsibility; 3) created an unpredictable system for determining whether to impose the death penalty; 4) created a mandatory death penalty for certain types of murders; 5) improperly shifted the burden of proof from the prosecution; 6) violated petitioner's right to an individualized consideration; 7) denied petitioner sufficient funds for an investigation of his case; 8) misled counsel as to what to introduce in mitigation; and 9) failed to subject petitioner's sentence to a proportionality review.

The Supreme Court decision in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934 (1989) resulted in a change to article 37.071 of the Texas Code of Criminal Procedure. Petitioner was sentenced under the former article 37.071 which required the judge to ask the jury the following questions:

> 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased would result?

2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

The new article 37.071 allows the jury to consider mitigating evidence in determining whether a reasonable doubt exists concerning the proper punishment for the defendant. Petitioner suggests that nine errors caused by the former article 37.071 occurred in his case. These will be reviewed in the order presented in the petition.

1. Jury Consideration of Mitigating Evidence

During the punishment phase of petitioner's trial, the defense presented several witnesses who testified about petitioner's good character traits. The prosecution did not present any contrary witnesses in return for defense counsel's agreement to limit the number of punishment witnesses.[16] Petitioner believes the former article 37.071 did not provide the jury with an avenue for fully and fairly considering this good character evidence.

Petitioner's reliance upon *Penry* for the proposition that "the former Texas statutory capital sentencing scheme makes it impossible for the jury to assimilate and act upon mitigating evidence" (Memorandum at 88 p. 32) is misplaced. "In *Penry*, the Supreme Court held that, where a capital defendant introduces evidence about his background, character or circumstances of the

[16] Buckner testified that this agreement had no impact on how many or which witnesses he planned to call anyway. He planned to present a limited number of nonredundant quality witnesses at punishment to highlight petitioner's good character throughout his life.

offense that reflects a reduced personal culpability, *and* the jury cannot give effect to the mitigating force of that evidence in responding to Texas' statutory punishment phase issues, the trial court must, upon request, provide instructions which allow the jury to consider and give mitigating effect to such evidence." *White v. Collins,* 959 F.2d 1319, 1322 (5th Cir. 1992), *citing Penry v. Lynaugh,* 492 U.S. at 319-328, 109 S.Ct. at 2947-2952. "*Penry* does not require that a sentencer be able to give effect to a defendant's mitigating evidence in whatever manner or to whatever extent the defendant desires." *White v. Collins,* 959 F.2d at 1322. "*Penry* does not invalidate the Texas statutory scheme, and *Jurek* [*v. Texas,* 428 U.S. 262, 96 S.Ct. 2950 (1976)] continues to apply, in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues." *Graham v. Collins,* 950 F.2d 1009, 1027 (5th Cir. 1992), *aff'd,* 113 S.Ct. 892 (1993).

Petitioner asserts that the jury could not properly consider his good character traits under the former article 37.071. The Fifth Circuit held in *Graham* that "good character evidence provides no variety of excuse" and the jury could properly consider such evidence under the second special issue of the former article 37.071. *Id.* at 1032-1033; *See Black v. Collins,* 962 F.2d 394 (5th Cir. 1992). Petitioner's claim is without merit and will be denied.

2. Jury was Misled

Petitioner relies on *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633 (1985) in his conclusion that the jury was misled in its responsibility to determine punishment. Petitioner recites the trial court's instruction to potential jury members that "the jury won't vote 'death' or 'life imprisonment.' That won't be the jury's vote, the way they vote. Two or possibly three questions will be submitted to the jurors, asking the jurors to answer those questions." Petitioner argues this instruction allowed the jury to be misled into believing the sentencing function was the responsibility of the court and not the jury. However, the quotation from the trial judge must be read in its full context. The trial court stated:

> If the jury should convict the defendant of capital murder, then the jury-- then there will be a second hearing, a punishment hearing, at which probably other evidence will be introduced. And the jury then will determine what the punishment should be.
>
> The jury won't vote "death" or "life imprisonment." That won't be the jury's vote, the way they vote. Two or possibly three questions will be submitted to the jurors, asking the jurors to answer those questions. Counsel will want to visit with you about those in just a few moments.
>
> All right.
>
> But, if all twelve jurors answer the questions "Yes," then the death penalty is automatic. (SF IX p. 7-8).

The trial court properly instructed the jury on its responsibility for determining punishment. *See Dugger v. Adams,* 489 U.S. 401, 407, 109 S.Ct. 1211, 1215 (1989). This claim is without merit and will be denied.

3. Unpredictable and Unreviewable System

Petitioner asserts that the Texas sentencing scheme creates a system whereby "both special issues can be answered affirmatively in any capital murder case, solely on the basis of the offense itself." (Memorandum at 129 p. 50). Petitioner believes this system has resulted in convicted capital murderers, in Texas, being sentenced to death in an arbitrary and capricious manner that is inconsistent with the Eighth and Fourteenth Amendments.

In *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950 (1976), the Supreme Court held the Texas sentencing scheme constitutional because it provided sufficient guidance to the jury to guard against arbitrary results. The issues presented, at punishment, provide a mechanism by which the sentencer can consider a broad range of evidence offered both in aggravation and in mitigation. *Id.* 428 U.S. at 273-74, 96 S.Ct. 2957. Petitioner's jury was afforded the right to consider the mitigation evidence his counsel presented. The jury, after considering the evidence of his good character and the facts of the four murders that petitioner was found guilty of committing, answered affirmatively the special issues. This claim is without merit and will be denied.

4. Mandatory Death Penalty

Petitioner asserts that the Texas statutory scheme creates a class of murders for which the death penalty is mandatory. Petitioner bases this assertion on the fact that the prosecution

did not present evidence at punishment, the prosecutor's argument concerning "mafia hit men," and petitioner's resulting sentence.

The Texas statutory scheme has never been held to create a mandatory death penalty for certain types of crimes. *Jurek v. Texas,* 428 U.S. at 267-69, 96 S.Ct. at 2954-55; *See Blystone v. Pennsylvania,* 494 U.S. 299, 303, 110 S.Ct. 1078, 1081-82 (1990). Although the murders that petitioner was found to have committed were certainly done in a way which could lead a jury to answer affirmatively the special issues, the statutory scheme does not create a class of murders for which mitigating evidence cannot be used to persuade the jury to impose a life sentence rather than the death penalty. This claim is without merit and will be denied.

5. Statutory Scheme Shifted the Burden of Proof

Petitioner claims that the special issues shifted the burden of proof from the prosecution to him. Petitioner alleges there are pivotal terms which are not defined. These terms are "deliberately" and "probability." This claim is without merit for two reasons. First, these terms have been held to have a common sense meaning that jurors are capable of understanding without definitions, *Jurek v. Texas,* 428 U.S. at 279, 96 S.Ct. 2958; *Barnard v. Collins,* 958 F.2d 634, 641 (5th Cir. 1992); *Thompson v. Lynaugh,* 821 F.2d 1054, 1060 (5th Cir.), *cert. denied,* 483 U.S. 1035, 108 S.Ct. 5 (1987); and second, the petitioner requested and was granted his specific instructions on the definitions for the terms about which he complains (Tr. 237-38).

Petitioner also asserts that the jury did not have specific instructions on how to consider mitigating evidence. This, according to petitioner, required the defense to submit such instructions and evidence of mitigation or assume the risk of non-persuasion. Petitioner presented mitigation testimony. The trial court instructed the jury that it was the prosecution's burden to prove beyond a reasonable doubt the special issues. The trial court allowed the jury to consider the evidence presented at both stages of trial in answering the special issues. There is no indication that the burden of proof for any issue ever shifted to the petitioner in the trial or punishment phase. This claim is without merit and will be denied.

6. Right to Individualized Consideration

Petitioner alleges that the trial court's failure to provide specific instructions on how to give consideration to mitigating evidence violated his right to individual consideration. The trial court is not required to give such instructions. *See Franklin v. Lynaugh,* 487 U.S. 164, 177, 108 S.Ct. 2320, 2329 (1988). Moreover, the Fifth Circuit has held that the Texas special issues allow the type of individual determination necessary in a death penalty case. *Graham v. Collins,* 950 F.2d at 1031-1033. This claim is without merit and will be denied.

7. Sufficient Funds for an Investigator

At the time of petitioner's trial, Texas allowed an indigent defendant $500 to hire an investigator pursuant to Tex. Code Crim. Proc. 26.05. Petitioner asserts that this sum is insufficient and resulted in him being denied effective assistance of counsel. *See Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087 (1985)(denial of psychiatric assistance at trial when defendant is asserting mental defect is a violation of the right to effective assistance of counsel). Petitioner contends that his lawyer should have investigated thoroughly the ballistics and other forensic evidence introduced against him and interviewed other witnesses from other states. Petitioner asserts his inability to carry out this extensive investigation was due to lack of funds. Petitioner never requested additional funds to conduct his extensive investigation nor did he show how the outcome of his trial would have been altered by this additional investigation. Indeed, petitioner has had several lawyers and an investigator assist him subsequent to his conviction, and he has not been able to find exculpatory evidence in the form of witness testimony or physical evidence that was available in 1984. This claim is without merit and will be denied.

8. Statute Misled Trial Counsel

Petitioner contends that his trial counsel was misled by the former article 37.071 as to what mitigating evidence was permissible at the sentencing hearing. Petitioner claims the

statutory scheme "dissuades, in fact almost prohibits, counsel from investigating and presenting to the jury other types of mitigation evidence" (memorandum at 157 p. 62-63). This claim has previously been addressed to some extent in connection with petitioner's ineffective assistance claim and was found to be without merit.

Petitioner has not shown that his counsel was rendered ineffective by the former article 37.071. Petitioner's trial counsel introduced evidence of his good character to the jury. Counsel limited this character evidence to a few witnesses in order to avoid the potential introduction of repetitive testimony on behalf of Petitioner. He has not shown that the presentation of additional character witnesses likely would have produced a different outcome. Petitioner does not allege he was suffering from a mental defect or that he had any other mitigation evidence that would allow a jury to find him less culpable in the murders of the four men in Sherman. This claim is without merit and will be denied.

9. Proportionality Review

Petitioner asserts he is entitled to a proportionality review. Petitioner alleges this review would demonstrate that his sentence was assessed in a capricious and arbitrary manner.

The Supreme Court has held that a proportionality review is not necessary in every case. *Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S.Ct. 871, 879 (1984). For discussion purposes the court will assume, as petitioner asserts, that *Pulley* requires that a court

allow mitigating evidence, along with particularized circumstances of the crime and the offender, to be considered by the jury, and that the special issues be worded in a way that they can be understood by a jury.

In Texas, all three of the requirements of *Pulley* are met, and thus a proportionality review is not necessary. All mitigation evidence is allowed to be introduced. *May v. Collins,* 904 F.2d 228, 232 (5th Cir. 1990), *cert. denied,* 502 U.S. 1046, 112 S.Ct. 907 (1992). Evidence about the circumstances of the crime and the offender is considered by the jury. *Graham v. Collins,* 950 F.2d at 1029-1030. And lastly, the special issues have a common sense meaning that allows the jury to understand the wording. *Barnard v. Collins,* 958 F.2d at 641. This claim is without merit and will be denied.

Trial Court's Failure to Instruct Jury on Mitigation

In his fourth ground for review, petitioner asserts the same claim presented in part six of his challenge to article 37.071 above. The Fifth Circuit has held that the Texas special issues allow the type of individual determination necessary in a death penalty case without further instruction by the trial court. *Graham v. Collins,* 950 F.2d at 1031-1033. This claim is without merit and will be denied.

Trial Court's Failure to Properly Define Terms

In his fifth ground for review, petitioner claims the trial court failed to properly define the words "probability" and "deliberately." Petitioner believes the lack of a proper definition resulted in the denial of his due process rights under the Fifth and Fourteenth Amendments.

The trial court defined "deliberately" and "probability" in the manner in which defense counsel requested (Tr. 227-228). This definition is consistent with that supplied by the Texas Court of Criminal Appeals. *See Cannon v. State,* 691 S.W.2d 664, 677 (Tex. Crim. App. 1985). Petitioner asserts that these definitions failed to direct the jury to fully consider the mitigating evidence presented pursuant to the mandate of *Penry*.

"In *Penry*, the Supreme Court expressed doubt about whether the jury could give effect to Penry's mitigating evidence of mental retardation and child abuse 'in the absence of jury instructions defining the word deliberately.'" *Barnard v. Collins,* 958 F.2d 634, 641 (5th Cir. 1992), *citing Penry,* 492 U.S. at 323, 109 S.Ct. at 2949. However, unlike Penry, Bower does not have any mitigating evidence of mental retardation or child abuse to present that would mitigate his actions in these murders. Also, the jury received proper instructions on the meanings of the two terms in question which were submitted by his own counsel. Furthermore, the Fifth Circuit has held that both "probability" and "deliberately" have "a plain meaning of sufficient content that the discretion left to the jury was no more than that inherent in the jury system itself."

Milton v. Procunier, 744 F.2d 1091, 1096 (5th Cir. 1984), *cert. denied,* 471 U.S. 1030, 105 S.Ct. 2050 (1985); *See also Woods v. Johnson,* 75 F.3d 1017, 1033 (5th Cir.), *cert. denied,* 519 U.S. 854, 117 S.Ct. 150 (1996). This claim is without merit and will be denied.

Trial Court Failed to Instruct Jury on the Effect of a "No" Vote

In his sixth ground for review, petitioner asserts that the trial court's failure to instruct the jury on the effect of a single "no" vote violated his rights under the Fifth, Eighth and Fourteenth Amendments.

Petitioner essentially argues that the application of the provisions of article 37.071(g) of the Texas Code of Criminal Procedure as it existed at the time of the petitioner's trial resulted in a violation of the petitioner's constitutional rights. This provision stated:

> The court, the attorney for the state, or the attorney for the defendant may not inform a juror or prospective juror of the effect of failure of the jury to agree on an issue submitted under this article. Article 37.071(g) Tex. Code Crim. Proc.

Bower believes that, although the jury was instructed in accordance with the provisions of article 37.071(d), which informs the jury that it may not answer any issue "yes" unless it agrees unanimously and it may not answer any issue "no" unless ten or more jurors agree, the failure to further instruct the jury on the effect of a single "no" vote created the possibility for an

arbitrary sentencing decision and diminished "the jurors" individual sense of responsibility.

The instructions given to the jury in petitioner's trial were specific as to the responsibility of the individual jurors. The instructions informed the jurors of the appropriate procedure to follow in the event that a single juror answered "no." Thus, the instructions are constitutional in accordance with the guidance of the Supreme Court. *See Mills v. Maryland,* 486 U.S. 367, 383, 108 S.Ct. 1860, 1870 (1988). This claim is without merit and will be denied. Additionally, petitioner is seeking a new rule of constitutional law which is barred by *Teague. See Davis v. Scott,* 51 F.3d 457 (5th Cir.), *cert. denied,* 516 U.S. 992, 116 S.Ct. 525 (1995).

Trial Counsel was Misled by Statute

In his seventh ground for review, petitioner asserts that trial counsel was rendered ineffective by the former Texas sentencing scheme. According to petitioner, trial counsel only presented the very limited testimony of six witnesses because he did not know what mitigation evidence he could present under the statutory language.

This allegation was refuted by trial counsel during the evidentiary hearing. Buckner noted that he was aware that he could present any aspect of petitioner's background to the jury for consideration in mitigation, but beyond good character, there was no mitigating evidence to present. It was trial counsel's intent

to limit the introduction of mitigating evidence to the best possible character witnesses who could testify to all aspects of petitioner's good character without being repetitive. Despite this, petitioner's own mother-in-law, Jo Wreyford, had to admit that her house had been burglarized and several guns stolen when petitioner was living nearby. Although Wreyford believed the cleaning lady had taken the items, she could not explain how one of her stolen guns was recovered from petitioner at the time of the house search incident to the murders (SF XIX p.17-20). The petitioner asserts that had counsel spent more time with Mrs. Wreyford, he would have been forewarned about the fact that the stolen firearm was found in petitioner's possession.

It is clear from trial counsel's testimony at the evidentiary hearing and the evidence at trial that trial counsel attempted to tailor the introduction of mitigation evidence in order to show that petitioner was a good man who loved his family and went to church regularly.[17] Petitioner has not shown that trial counsel's representation was deficient or that any prejudice resulted. Trial counsel's conduct exhibited a strategic choice to limit mitigation testimony, and thus petitioner had effective assistance of counsel. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. The statute had no effect on the mitigation evidence that was presented by trial counsel. This claim is without merit and will be denied.

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[17] Bower joined the church on October 9, 1983, the day after the four murders (SF XIII p. 76). The following day October 10th, Bower was sick at home with a virus (SF XIII p. 35).

Prosecutor's Remarks on Petitioner's Failure to Testify

In his eighth ground for review, petitioner argues that the prosecutor made two remarks during closing arguments at sentencing suggesting that petitioner had failed to show remorse for the crimes he had committed. Petitioner believes that these remarks were a comment on his failure to testify which violated his protection from compulsory self-incrimination found in the Fifth Amendment. *See Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229 (1965).

In *Griffin,* the Supreme Court held that it is a violation of a defendant's right against self-incrimination for the prosecutor to make comments on his failure to testify. *Id.* However, the Supreme Court held two years later that a violation of a defendant's Fifth Amendment *Griffin* right could be rendered harmless. The proper analysis for a harmless error concerns the central question of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v.California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967), *citing Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229 (1963).

The first remark made by the prosecutor and challenged by the Petitioner was as follows:

> Not one single bit of remorse for what he did. Look at him. Do you see him right now? Do you see him feel bad for what he did? Does he feel bad? (SF XIX p. 44)

After this remark, petitioner's trial counsel objected to the statement as an improper comment on petitioner's failure to

testify. The trial court sustained the objection and instructed the jury to disregard the comment. The prosecutor then stated:

> You can see him in the courtroom. You can look at him. He talked to the FBI. He talked to those FBI Agents on three occasions. At one time did he ever say, "Gosh, I don't know what got into me. I did it and I feel horrible. I'm sorry."? Never.

Defense counsel again objected based upon the privilege against self-incrimination, but was overruled by the trial court. These are the remarks about which petitioner complains.

"It is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States v. Hastings,* 461 U.S. 499, 509 (1983). In this context, any alleged error arising from the remarks of the prosecutor were harmless. The trial court instructed the jury to disregard the first statement, and the second statement was a reflection of the sequence of the events in the investigation, during which the petitioner was interviewed three times by the FBI.

In federal habeas corpus proceedings, an inquiry into the harmlessness of a constitutional error asks whether, in light of the record as a whole, the failure of the trial court to take some action had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 638, 113 S.Ct. 1710, 1722 (1993)(*quoting Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 1253 (1946)). In order for an error to have a "substantial and injurious effect or influence," it must have affected the verdict. *Oneal v. McAninch,*

513 U.S. 432, ___, 115 S.Ct. 992, 994 (1995). An error is harmless when the error did not substantially sway or substantially influence the response of the jury. *Kotteakos,* at 765, 66 S.Ct. at 1248.

The comments about the interviews with the FBI are summations of the evidence and cannot be construed as comments on petitioner's failure to testify. Additionally, the trial court instructed the jury to disregard the first remark and the jury is presumed to have followed the court's instructions. This claim is without merit and will be denied.

Evidence Supporting Future Dangerousness

In ground for review eleven, petitioner asserts that the evidence was insufficient to support the jury's finding under then article 37.071(b)(2) of the Texas Code of Criminal Procedure, which is commonly referred to as the future dangerousness determination. In support of this claim,petitioner relies on the failure of the state to introduce any evidence at the punishment phase of the trial.

Insufficiency of the evidence claims will not support relief unless it can be shown that no rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, could have found the existence of facts necessary to establish the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89 (1979). This same standard is used in testing the sufficiency of

the evidence in special punishment issues in a Texas capital murder trial. *Thompson v. Lynaugh,* 821 F.2d 1054, 1058 (5th Cir. 1987).

In Texas, a jury is permitted to look at several factors in its review of future dangerousness, including but not limited to:

1. The circumstances of the capital offense, including the defendant's state of mind and whether he was acting alone or with other parties;

2. The calculated nature of the defendant's acts;

3. The forethought and deliberateness exhibited by the crime's execution;

4. The existence of a prior criminal record and the severity of the prior crimes;

5. The defendant's age and personal circumstances at the time of the offense;

6. Whether the defendant was acting under duress or the domination of another at the time of the offense;

7. Psychiatric evidence; and

8. Character Evidence.

State v. Vanderbilt, 973 S.W.2d 460, 464 (Tex. App.-Beaumont 1998).

There have been a number of cases in which the Texas Court of Criminal Appeals has held that the evidence presented in capital murder cases was insufficient to demonstrate future dangerousness. For example, in *Beltran v. State,* 728 S.W.2d 382, 390 (Tex. Crim. App. 1987), the court held that the evidence was insufficient because there was no showing of planning or intent that the murder would occur. In *Wallace v. State,* 618 S.W.2d 67, 68-69 (Tex. Crim.

App. 1981), the court held that the evidence of future dangerousness was insufficient because the defendant did not himself kill the victim and the circumstances of the murder were insufficient to support a finding of future dangerousness. Lastly, in *Warren v. State,* 562 S.W.2d 474 (Tex. Crim. App. 1978), the court held the evidence was insufficient to support a finding of future dangerousness where the murder was not shown to be a "calculated act," and the victim had pulled a gun on the defendant. *Id.* 562 S.W.2d at 476-77.

Under article 37.071(b)(2), the state must prove beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Petitioner argues that the state did not meet its burden because it did not present any witnesses or evidence at the punishment hearing. Under this argument, the state would be required to reintroduce at the punishment phase all evidence that could form the basis of a future dangerousness determination. Such an approach is not required by the Constitution or Texas law.

Petitioner believes the only evidence adduced at the punishment phase demonstrated that he was a family man who was unlikely to pose a future danger to society. However, the petitioner's evidence was not the only evidence available for the jury to consider on this issue. The jury also had the evidence from the guilt/innocence phase to consider. The jury had already received considerable circumstantial evidence from the state which

was offered to prove that the petitioner had executed at close range four men in order to fulfill his obsession with obtaining an ultralight aircraft. The jury based its future dangerousness decision upon sufficient proof that petitioner presented a continuing danger to society. This claim is without merit and will be denied.

Juror Marine

In ground for review twelve, petitioner contends that juror Bobbie Jean Marine was improperly removed from the jury panel. Mrs. Marine was 34 years old at the time of the *voir dire* examination. Marine had four children and was the wife of a "Holiness preacher." Marine did not graduate from high school. The specific questioning of Marine by the state was as follows:

> Q: How do you feel about the death penalty? Do you agree or disagree?
>
> A: I disagree.
>
> Q: You disagree?
> ....
> Q: Okay. Can you tell us how long you have felt that way?
> ....
> A: Since I have been an adult.
> ....
> Q: Are your feelings against the death penalty such that there are no circumstances under which you could ever vote to give the death penalty to anyone?
>
> A: Right.

The prosecuting attorney then went on to further elicit from Mrs. Marine that she would answer the mandatory questions "no" regardless of the evidence in order to avoid being responsible for assessing the death penalty.

The defense was allowed to question Marine concerning her beliefs. Marine said she would answer the questions truthfully but concluded with the statement "I don't think I could sit here and tell you that I could answer that yes, knowing in the back of my mind if I said yes, that the final decision would be the death penalty." Marine then related that she would answer the special issues "no" even if she felt the correct answer was "yes." The trial court then excused Marine for cause.

A juror is properly excluded if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852 (1985). The trial court's determination to exclude jurors is to be accorded deference. *Id.* 469 U.S. at 427, 105 S.Ct. at 854. Under this standard, the transcript of the voir dire of prospective juror Bobbie J. Marine demonstrates that her personal views would substantially impair the performance of her duties as a juror. The trial court properly excluded Marine for cause. This claim is without merit and will be denied.

Failure to Disclose Exculpatory Evidence

In ground for review thirteen, petitioner asserts that the prosecution failed to disclose exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). The evidence petitioner refers to is the statement of a witness who contacted the FBI after the conclusion of petitioner's trial. This witness is

the person identified earlier in this opinion as "Witness # 2" whose true identity has been sealed upon the request of petitioner's counsel. Petitioner admits that he received a copy of the FBI report containing Witness # 2's statement prior to the time he filed his motion for new trial. Petitioner contends however that the FBI report summarizing the interview with Witness # 2 is inaccurate because it does not state that Witness # 2 allegedly said that the petitioner was not one of the men she saw from the road in front of the B&B Ranch on October 8, 1983.

In order to succeed on a *Brady* claim, petitioner must show that the prosecution suppressed evidence favorable to him, and the evidence was material to the issues of guilt or punishment. *Id.* 373 U.S. at 87, 83 S.Ct. at 1196. Petitioner cannot meet this burden. The witness told the FBI agent that one of the men she saw had a large build, dark hair, a dark mustache and possibly a beard. The photo of the petitioner, which the witness had seen in the news, was of a clean-shaven man. Petitioner had shaved his beard before trial. Petitioner also had dark hair, was 5'11" tall, and weighed 240 pounds. (State's Exhibit 68F). Although the witness testified that the man she saw from 400 feet away was not the clean-shaven man she had seen on television, her description was of a man who was, or very much resembled, petitioner on October 8, 1983. Additionally, the prosecution made defense counsel aware of the witness' existence and provided the summary of the interview they had conducted. Thus, the existence of any exculpatory evidence was available for counsel to ascertain through the exercise of

reasonable diligence. Lastly, the interviewing agent, Blanton, testified at the evidentiary hearing that he accurately recorded the statement of Witness # 2. This claim is without merit and will be denied.

Ineffective Assistance of Counsel in Relation to Witness #2

In ground for review fourteen, petitioner asserts that trial counsel and/or appellate counsel were ineffective in not moving for a new trial based upon the FBI report of Witness # 2's statement.

The evidence that was available to defense counsel prior to the deadline for filing a motion for new trial was that a witness had seen three men, including a large man with dark hair and possibly a beard, at the B&B Ranch shortly before the murders. The witness also observed a vehicle at the scene that resembled a Bronco or Blazer. Petitioner did fit this description and was driving an International Scout at the time.(SF XVII p. 93). The witness's statement, as summarized in the FBI report, is not exculpatory.

Petitioner is entitled to effective assistance of appellate counsel. *Schwander v. Blackburn,* 750 F.2d 494, 502 (5th Cir. 1985). Counsel has the duty to raise every nonfrivolous point upon appeal. *Anders v. California,* 386 U.S. 738, 744, 87 S,Ct, 1396 (1967). Petitioner has not demonstrated that counsel did not fulfill this task. Appellate counsel raised several of the points that petitioner asserts in his habeas petition. Counsel's failure to request a new trial based upon the statement of Witness # 2 to the

FBI must be viewed in the context of what was known to counsel after the trial in 1984, not what the witness now alleges in her present affidavit and testimony. Additionally, given Witness # 2's demeanor and testimony presented at the evidentiary hearing, this court is of the opinion that the testimony would not have lead to a new trial or relief on appeal even if presented live to the state trial court. This claim is without merit and will be denied.

Conclusion

This court has reviewed each claim presented by petitioner. After reviewing the claims and conducting an evidentiary hearing on petitioner's claims of actual innocence and ineffective assistance of counsel, this court concludes for the reasons stated herein that there is no basis for granting petitioner relief pursuant to 28 U.S.C. § 2254. It is accordingly

ORDERED that petitioner, Lester Leroy Bower Jr.'s request for relief pursuant to 28 U.S.C. § 2254 is **DENIED**.

SIGNED this 6th day of September, 2002.

Richard A. Schell

Richard A. Schell
United States District Judge